PARAMESWARI SINNATHAMBY

v.

KARTHI KEYAN VELUSAMY

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[DIVORCE PETITION NO: S8-33-206-2003]
3 NOVEMBER 2004

FAMILY LAW: *Divorce - Division of matrimonial property - Property purchased by husband in his name - Whether wife entitled to equal share - Whether wife made substantial contributions - Law Reform (Marriage and Divorce) Act 1976, s. 76(3), (4)*

FAMILY LAW: *Children - Custody - Maintenance - Husband did not attempt to see child for 2 1/2 years - Wife cared for child since birth, providing for education and preparing for child's future - Whether wife entitled to custody and maintenance*

This was a petition for divorce by the petitioner wife against the respondent husband. Both parties agreed to the dissolution of their marriage. The issues were in respect of the division of property, custody of the only child of the family aged five years ('the child') and maintenance. The respondent averred that the petitioner did not make any contribution towards the matrimonial home and that it was purchased by the respondent through his own efforts; thus invoking s. 76(3) and s. 76(4) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The respondent also alleged that the petitioner and her family were coaching and influencing the child against him.

Held (allowing the petition):

[1] The sale and purchase agreement of the matrimonial home ('S&P') was dated less than one month before the parties were engaged to be married and about six months before their marriage. Therefore, although the property was purchased in the respondent's sole name, it was purchased in anticipation or in contemplation of marriage. Thus, it was property jointly acquired by the parties, in which case, pursuant to s. 76(1) and s. 76(2) of the Act, the court shall incline towards equality of division. The spirit and intent of s. 76 of the Act was to protect and provide for the wife and children of the marriage in the event of divorce. There can be no precise mathematical formula that can be used in determining the

proportion or the division of the matrimonial assets. While it could not be denied that the S&P and the loan agreement thereto were only in the respondent's name, the contributions by the petitioner could not be denied, disregarded and/or dismissed. (pp 638 g-h, 639 a & 640 c-d)

[2] The petitioner contributed substantially towards the family expenses. She made improvements to the matrimonial home. The respondent benefited substantially from the petitioner's contributions. She also assisted the respondent financially by easing his burden and single handedly contributing towards the family's expenses. She was a meticulous person who kept account of her earnings and expenditure and did not spend unnecessarily. She was a responsible parent in not only caring for the child of the family from birth but also providing for his education and preparing for his future. She admirably managed all the years by being thrifty, prudent and hardworking. She showed proof of her contributions, the income she received and how she managed her expenses to date. She made full and frank disclosure as expected of parties facing a divorce to assist the court to order a fair distribution of the matrimonial assets and to order just maintenance. (pp 640 h, 641 a-b, g-h & 642 a-e)

[3] The respondent's prayer for unreasonable access towards the child would clearly interfere with the upbringing of the child especially since the respondent did not make any attempt to see the child for 2 1/2 years. His excuse for not being in contact with the child was frivolous and vexatious. The petitioner made numerous calls to the respondent with a view of reconciliation. That showed that she never wanted the child to grow up not knowing the father. The respondent only called her to remove her belongings from the matrimonial home. No attempt was made by the respondent to contact the child until the court hearing. (pp 642 f-h & 643 a-b)

[4] A father's absence from a child's life is a very traumatic experience for a child of tender years. Only time and love can bridge the gap or void created. The respondent could be considered an absentee father whose sudden and sporadic visits would not give results overnight. The respondent's visits caused disharmony in the petitioner's family leaving the child confused and unsure. His happy life was disrupted every two weeks by the respondent's brief but highly emotional visits. It was clear that the respondent's conduct was the sole cause for the disintegration of the marriage and that the petitioner should be spared of further emotional and financial strain. (pp 643 g & 644 a)

Case(s) referred to:
Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 CA ***(refd)***
Leow Kooi Wah v. Philip Ng Kok Seng & Anor [1997] 3 MLJ 133 ***(refd)***
Wong Kim Foong v. Teau Aah Kau [1998] 1 CLJ 358 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 76(1), (2), (3), (4)

For the wife/petitioner - K Maheswary; M/s Maheswari & Co
For the husband/respondent - R Kengadharan; M/s R Kengadharan & Co

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:
The petitioner wife and the respondent husband were duly married on 1st November 1998. This is a petition for divorce by the petitioner wife. Both parties are agreeable to the dissolution of the marriage. The petitioner has led evidence that the breakdown of the marriage was caused by the intolerable and unreasonable behaviour of the respondent. After the marriage the parties lived at No. 32, Jalan USJ 3/2J, 47600, Subang Jaya, Selangor Darul Ehsan (with the respondent's family) until early April 2000 and thereafter on their own at No. 322, Blok A, Damai Apartments, No. 1A, Jalan PJS 8/9, 46000 Petaling Jaya from early April 2000 until early November 2000. This property is the matrimonial home. The petitioner had contributed throughout the subsistence of the marriage and had taken care of the only child of the family namely Lyngkaran a/l Karthi Keyan now aged 5 single-handedly. No financial provision in the form of maintenance or property division has been made by the respondent for the petitioner or for the child of the family. The respondent in his reply dated 12 August 2003 avers that the petitioner did not make any contribution towards the property and the respondent's counsel had submitted orally in court on 2 August 2004 that the matrimonial home was purchased by the respondent through his own efforts; thus invoking s. 76(3) and s. 76(4) of the Law Reform (Marriage and Divorce) Act 1976. The sale and purchase agreement for the matrimonial home is dated 22 April 1998. The parties were engaged to be married on 17 May 1998 and got married on 1 November 1998. There is less than one (1) month between the date of the sale and purchase agreement and the engagement and only a lapse of about six months between the marriage and the signing of the sale and purchase agreement. Therefore I am of the view that although the property was purchased in the respondent's sole name, the property was purchased in anticipation of marriage or in contemplation of marriage; thus it qualified to be a property jointly acquired by the parties. In which case pursuant to s. 76(1) and s. 76(2) of the Law

Reform (Marriage and Divorce) Act 1976 the court shall incline towards equality of division. In the case of *Wong Kim Foong (f) v. Teau Aah Kau @ Chong Kwong Fatt* [1998] 1 CLJ 358 the court referred to:

> Lord Denning MR in *Ulrich v. Ulrich* [1968] 1 All ER 67 had to deal with the problem of the parties who bought the house before their marriage. This was what his Lordship said at page 69 of the report:
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> > The first point is this: what is the law about money put up before marriage so as to acquire the home? It was submitted to the judge that it was just the same as any case where two strangers (not husband and wife) put up money to buy a house. If the conveyance is taken in the name of one, there is a resulting trust for the two of them, in the proportions in which they contributed. Just like the case of *Bull v. Bull* [1955] 1 All ER 253; [1995] 1 QB 234, where there was a mother and son, each of whom contributed money. It was held that, although the property was in the name of the son, there was a resulting trust in proportion to their contributions. So here the judge thought that, as the wife had contributed some 500 Pound, and the husband contributed two thousand Pound by way of the mortgage, that there was a resulting trust as to one-fifth and four-fifths.
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> > I am afraid that I cannot agree with the judge's view. In the first place, I think that money contributed by a man and woman before marriage, with a view to setting up a matrimonial home, are in the same position as moneys contributed by them after marriage. They are contributed to the purchase of property which is intended to be a family asset. When the marriage takes place, it becomes a joint asset belonging to both in equal shares. Such is the position, at any rate, if and when the marriage takes place. It might be very different if there was no marriage at all. If the marriage never took place, the whole thing might have to be cancelled. There would probably in those circumstances be a resulting trust in the proportions in which they contributed. When the marriage takes place as contemplated, however, I am satisfied that the moneys stand in the same position as moneys contributed after the marriage. I would repeat at this state what I said in *Fribance v. Fribance* [1957] 1 All ER 357 at pp. 359-360, in regard to family assets. These are:
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> > > The things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it. When these are acquired by their joint efforts during the marriage (or, I would add, before it) the parties do not give a thought to future separation. They do not contemplate divorce. They contemplate living in the house and using the furniture together for the rest of their lives. They buy the house and furniture out of their available resources without worrying too much as to whom it belongs. The reason is plain. So long as they

> are living together, it does not matter which of them does the saving and which does the paying, or which of them goes out to work or which looks after the home ...
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> The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure ... the product should belong to them jointly. It belongs to them in equal shares.

In our case it is observed that the extent of contribution by the petitioner is so substantial that it would lead to the same conclusion. I am of the opinion that the spirit and intent of s. 76 Law Reform (Marriage and Divorce) Act 1976 was to protect and provide for the wife and child(ren) of the marriage in the event of divorce. There can be no precise mathematical formula which can be used in determining the proportion or the division of the matrimonial assets as seen in numerous authorities. Whilst it is not denied that the sale and purchase agreement and the loan agreement is only in the respondent's name, the contributions by the petitioner cannot be denied, disregarded and or dismissed. They have to be considered earnestly.

The contributions which have been adduced in the exhibits to the petition dated 19 February 2003 and the petitioner's bundle of documents can be summarized as follows.

Direct Contributions

The petitioner had paid two monthly instalments in the sum of RM250 on 23 December 1999 and 28 March 2000 (exh. "PS4" of the petition). Thus the respondent had lied in his reply that the petitioner did not contribute towards the matrimonial property. The petitioner had taken a loan of RM5,000 from the Koperasi Serbaguna Pekerja-Pekerja Malaysia Berhad on 23 November 1999, months before the parties moved into the matrimonial home in early April 2000 (exh. "P5" in the petition and also "Dokumen L" of Ikatan Dokumen Pempetisyen). This is admitted by the respondent in his reply. The petitioner at that time was earning approximately RM2,042.90 (basic salary RM1,618 + allowances) and after deductions her nett pay was RM1,145.57 (based on February 2000 salary slip – marked "Dokumen G" of Ikatan Dokumen Pempetisyen). As seen in exh. "PS3" of the petition, at or around the same time in June 2000 the respondent earned far less and his total income was RM1,427.56 and his nett pay after deductions was RM433.81. A total of RM642.62 was deducted monthly towards the housing loan taken on the 1st property. Thus, it does not come as a surprise that the petitioner had contributed substantially towards the family expenses. The child of the family

was born on 27 July 1999 just about nine months after the marriage and thus the petitioner was burdened with further expenses. The respondent only took a housing loan for the matrimonial property and paid RM269.40 monthly (based on the loan agreement exhibited at p. 57 of the Ikatan Dokumen Responden). The respondent even defaulted in this housing loan as seen in "Dokumen J" Ikatan Dokumen Pempetisyen. The petitioner took a renovation loan of RM5,000 to renovate the property. The sum of RM5,000 was not all what the petitioner had expended. She had expended on the fixtures and fittings of the house. This is clear from the invoices and the receipts exhibited in "Dokumen M" of the Ikatan Dokumen Pempetisyen. Therefore, the petitioner made improvements to the matrimonial property and indeed created a home.

Indirect Contributions

The principle by which the court should exercise discretion are set out by the Court of Appeal in the case of *Ching Seng Woah v. Lim Shook Lin* [1997] 1 CLJ 375. The law recognizes a wife's contribution in looking after the home and children. In the present case, the petitioner wife was a working woman when she married the petitioner. In addition thereto, she paid for all the household bills like marketing and groceries as seen in "Dokumen N" Ikatan Dokumen Pempetisyen. When the petitioner was still married to the respondent, the petitioner had also paid towards the babysitter in "Dokumen H" Ikatan Dokumen Pempetisyen. This is admitted to by the respondent in his reply. The petitioner had from December 1998-January 2000 paid towards the Respondent's Visa Card ("Dokumen I" Ikatan Dokumen Pempetisyen). The petitioner also had to cover other general expenses of the respondent and had given him money from time to time as seen in "Dokumen K" and "Dokumen N" Ikatan Dokumen Pempetisyen. The respondent has exhibited only one medical receipt dated 30 July 1999 ie, the medical expenses incurred during the delivery of the only child of the family (p. 120-125 of the Ikatan Dokumen Responden). The petitioner has according to the records shown in "Dokumen P" Ikatan Dokumen Pempetisyen incurred all medical expenses for herself and the child of the family from 14 January 2000 till now. There is no doubt that the respondent benefitted substantially from the petitioner's contributions. Thus, it comes as no surprise that the petitioner had assisted the respondent financially by easing his burden and single handedly contributed towards the family's expenses.

I am of the view that the petitioner has made a full and frank disclosure of her earnings and expenses. At a glance, it is clear that the petitioner has always been a very meticulous person who keeps accounts of her earnings and expenditure and does not spend unnecessarily and has been a responsible parent in not only caring for the child of the family from birth but also providing

for his education and preparing for his future by investing in insurance (see "Dokumen B & F" Ikatan Dokumen Pempetisyen). The petitioner has admirably managed all these years by being thrifty, prudent and hardworking. She has advanced in her career and is able to send the child for "Smart Reader's class". She has employed a foreign maid to assist in the household chores (see "Dokumen C, D and E" Ikatan Dokumen Pempetisyen). It is noted that all along the respondent led a care-free life; free of his responsibility as a spouse, free of responsibility as a father to a very young child. In the case of *Ching Seng Woah per curiam* the court considered that ss. 52, 92 and 95 in that order. It was stated that the parental duties as in s. 92 extends to accommodation, clothing, food and education as may be reasonable having regard to his or her needs and station in life or by paying the cost thereof. The court's powers under s. 52 are very wide and transcends the limitation contained in s. 95 because s. 52 operates in a situation where the family is being legally disintegrated. Therefore, any transfer of property ought not be just for the benefit of the spouses but also for the benefit of the dependent children. I think the petitioner is not asking for much. She has merely claimed RM500 as maintenance for herself and RM500 until a further order as maintenance for the child of the family. The petitioner is further seeking 1/2 share in the matrimonial asset as her contribution is not merely financially but also towards taking care of the said property and caring for the child of the family. The petitioner has shown proof of her contributions, the income she received and how she managed the expenses when she was still married to the respondent and has even disclosed her current earnings and the expenses which she incurs on a monthly basis. Thus the petitioner has, made full and frank disclosure as expected of parties facing a divorce, to assist the court to order a fair distribution of the matrimonial assets and to order just maintenance. See *Leow Kooi Wah v. Philip Ng Kok Seng & Anor.* [1997] 3 MLJ 133.

The petitioner has prayed for sole custody of the child of the family which the respondent has contested but he is agreeable that the care and control of the child be entrusted to the petitioner. The respondent has prayed for unreasonable access towards the child which would clearly interfere with the upbringing of the child especially since the respondent did not make any attempt to see the child for 2 1/2 years. The respondent's excuse for not being in contact with the child is frivolous and vexatious. In his reply, at para. 6(i) he says the petitioner prevented him from being with the child during the duration of the marriage and again after their separation. At para. 6(p) of his reply he states that the family members made him uncomfortable when he visited the child at the petitioner's sister's place. His last recorded visit was 12 January 2002 until the court ordered interim access on 14 June 2004. The

petitioner had in para. 8(o) of her petitioner listed numerous dates when she called the respondent with the view of reconciliation and this clearly shows that she never wanted the child to grow up not knowing the father. However, the respondent called the petitioner on 4 April 2001 and asked her to take her belongings from the matrimonial home. The petitioner had made a police report on this as exhibited in exh. "PS8" of the petition. No attempt were made by the respondent to contact the child until the court hearing on 14 June 2004; in spite of the respondent's long absence, the petitioner had said in open court that she had never prevented the respondent from seeing the child and will not impede any attempts by the respondent to see the child in future. If the petitioner had indeed prevented the respondent from visiting the child, why was no action taken by the respondent? Since the granting of the interim access by the court, the respondent has only proved to be a nuisance at the petitioner's sister's home by appearing at or around 9am on alternate Sundays and creating an unpleasant atmosphere by expecting the child of the family to immediately take to him. The letter of 24 June 2004 written to the respondent's solicitors explaining to them that the child was rather apprehensive on meeting the respondent after 2 1/2 years and therefore is urged to advise the respondent not to remove the child from his familiar surroundings. All this was denied by the respondent's solicitors *via* their letter dated 6 July 2004 and instead they replied that the child will only be apprehensive if he or she was coached and or threatened and the letter of 18 July 2004, written to the respondent's solicitors to inform them that the child was dragged by the respondent and was even threatened with physical harm. I think in the circumstances the child of course struggled himself free and ran into the house and hid behind the petitioner but the respondent again forcibly carried him out. The child again ran out of fear. I think the respondent should be gentle and to exercise patience in handling the delicate situation. Each visit becomes a nightmare for the petitioner and the child of the family who still refuses to acknowledge the respondent as his father. The respondent during each meeting alleges that the petitioner and the family are coaching and influencing the child against him. A father's absence from a child's life is a very traumatic experience for a child of tender years. Only time and love can bridge the gap or void that has been created. The respondent can be considered "An Absentee Father". His sudden and sporadic visits cannot give results overnight. The respondent's visits have caused disharmony in the petitioner's family leaving the child confused and unsure. The child's happy life is disrupted every two weeks by the respondent's brief but highly emotional visits.

It is clear here that the respondent's conduct was the sole cause for the disintegration of the marriage and the petitioner should be spared of further emotional and financial strain. For these reasons the court grant order in terms of prayer:

(a) OIT;

(b) Custody, care and control to petitioner wife with reasonable access (from 10am to 7pm on Sunday) to respondent husband;

(c) Dismissed;

(d) OIT;

(e) OIT;

(f) Each party bears his/her own costs.